No. 81-55

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IN THE

Supreme Court of the United States

October Term, 1981

THE PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

against

PAUL IRA FERBER,

Respondent.

On Petition for Writ of Certiorari to the New York State Court of Appeals

REPLY BRIEF FOR PETITIONER

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The brief in opposition to certiorari is based primarily on rhetoric, its theme being that the court below was correct on the merits. By addressing the merits, respondent apparently concedes that this case presents an unresolved and important issue. That concession becomes clear in respondent's conclusion at page 18 that his position is supported by twenty-two states. For that conclusion neglects the fact that nineteen other states have decided that they can best protect children by statutes similar to the New York provision which has been declared unconstitutional in this case. Given these diverse views on whether it is permissible to

protect children by prohibiting the dissemination of non-obscene material produced by the sexual exploitation of children, this case presents precisely the kind of issue which calls for a grant of certiorari.

Notably, in arguing the merits, respondent is frequently wrong. The most fundamental error is his insistence that "only obscene materials fall outside the protection of the First Amendment." *Brief in Opposition to Certiorari*:15. By so insisting, respondent ignores other utterances which are not protected by the First Amendment. *See Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 571-72 (1942); *see also Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969). More significantly, respondent ignores that the First Amendment is not absolute and that determining whether a particular statute has violated that amendment calls for a careful balancing of the competing interests. *See* TRIBE, AMERICAN CONSTITUTIONAL LAW, 581-82 (1978).

In this case, the First Amendment interest in the dissemination of materials produced by making children engage in sexual conduct must be balanced against the interest in protecting children from sexual abuse. Respondent apparently but mistakenly believes the issue has been resolved by the obscenity decisions of this Court, in particular *Ginsberg* v. *New York*, 390 U.S. 629 (1968).

As respondent points out, *Ginsberg* is a "variable" obscenity case which holds that the state may prohibit distribution to children of sexually explicit material which is not considered obscene when viewed by adults. The decision in that case is based upon the transcendent state interest

in protecting the general welfare of children. Here the interest is protecting children from actual abuse in the production of films, plays or photographs. This interest is substantially greater than that of protecting the general welfare of children which justified the prohibition on dissemination in the *Ginsberg* case.

Given the greater and different evil of sexually abused children, the obscenity test seems singularly inappropriate as a standard by which to evaluate legislation designed to deal with that evil. Thus, in striking the balance, the Court could eliminate the obscenity requirements that the work be taken as a whole and appeal to the prurient interest. *See Miller* v. *California*, 413 U.S. 15, 24-26 (1973). Further, the Court could modify or eliminate entirely the community standards requirement or, perhaps, modify any or all of the exceptions for serious artistic, literary, educational, or scientific works. *Id.*

Believing that no balance should be struck, respondent argues that the section in question, 263.15, is unnecessary. It is unnecessary because, according to respondent, section 263.10 prohibits the promotion of an obscene performance containing the sexual conduct of a child, and that section is more than adequate to deal with child pornography. Yet, as pointed out at pages 9-11 of the petition, and uncontradicted by respondent, there are good reasons why the Legislature decided that 263.15, without an obscenity requirement, was necessary to assure a statutory scheme which would be as effective as possible in protecting children.

In eliminating the obscenity requirement, and protecting children by prohibiting dissemination of all materials

produced by sexually abusing children, New York and nineteen sister-states follow a long tradition of prohibiting commerce in materials which are produced by socially harmful means. *See, e.g., United States* v. *Darby*, 312 U.S. 100, 116, 119, 125 (1941). The *Darby* case makes it at least arguable, if not clear, that New York could generally ban the dissemination of any products, including books or films, which have been manufactured by abusing children. Rather than enacting a general ban, New York, for good reason, has focused on a particular kind of abuse and a particular type of product.*

Respondent, however, opines that "the unexamined assumption that by eliminating sources of distribution, those who make films of children engaged in sex will be discouraged, is a dangerous doctrine." *Brief in Opposition*: 9. As seen by the authorities cited at page 17, n.5 in the petition, the assumption is neither unexamined nor incorrect. Nor is it a "dangerous" tactic—the prohibition of commerce in materials which are produced by socially harmful means is a long-accepted and frequently employed method of preventing social harms. *See e.g., United States* v. *Darby, supra.*

Respondent unpersuasively seeks to show the so-called danger by proffering a parade of horribles involving sup-

* Notably, in the state courts, respondent never argued that the Legislature created an unconstitutional classification by making it a felony to disseminate material depicting sexual conduct by children, but not punishing similarly the dissemination of other material depicting other kinds of child abuse or children engaged in dangerous activity. Further, the opposition to certiorari never even remotely intimates that the court below correctly decided this case because the statute creates an impermissible classification. Indeed, to the extent that the decision below is so based, there is no opposition to the petition's showing that such a decision presents a substantial constitutional question. *See* Petition: 17-18.

posed statutory prohibitions on the dissemination of news or scientific writings for the purpose of combatting political terrorists, or criminals. *Brief in Opposition*: 9. True, commerce in materials produced by illegal means may not be restricted, for example, to suppress news concerning illegal activity. The court below, however, did not invalidate the statute merely because of a possibly overbroad statutory ban on news dissemination or for that matter, on scientific or educational material. Rather, the court below believed itself bound by this Court's obscenity decisions. Thus it held that the state may not prohibit promotion of any non-obscene material, even material produced by sexually abusing children, such as the films sold by respondent.

At pages 12-14 respondent contends that any statute regulating non-obscene materials is by definition overbroad. For example, he says that such a prohibition would encompass a Broadway play which is not obscene in its entirety, but "shows" the rape of a fifteen-year-old girl. It is difficult, however, to see the constitutional objection to the statute if it permits prosecution of those who put on or sell tickets to such a show, if that show involves the actual sexual abuse of a child.

In further support of an overbreadth argument, indeed throughout this litigation, respondent has referred to certain popular movies, the showing of which he contends would have violated the New York statute. Notably, during oral argument in the New York Court of Appeals, counsel admitted that he had never seen any of the movies. In addition, these movies were never shown to any of the state courts which had this case before them. Moreover, each of these movies may not, in fact, depict children in a

manner forbidden by the New York statute. In this regard, counsel has never indicated any awareness of sophisticated cutting techniques which allow the use of adult doubles, thereby permitting the production of movies, including performances by some of the child actresses to whom he refers, without any actual sexual conduct by such children. *See, e.g., The New York Times,* June 15, 1980, §2, p. 25, col. 2 (report that a double was used to film Brooke Shields' nude scenes in *The Blue Lagoon*). And with respect to plays, producers have had little trouble finding adult performers to play children's roles. *See, e.g., The Village Voice,* September 24-30, 1980, pp. 36-37; *The Daily News,* December 12, 1980, p. 9, col. 2 (report that the producers of the Broadway production of *Lolita* auditioned seventy-five girls under the age of fourteen for the title role but finally chose a twenty-four-year-old actress to play the part).

More importantly, these and other examples, which, according to respondent, demonstrate the statute's overbreadth, beg the question whether there are any circumstances under which the state's interest in protecting children is sufficiently compelling to justify prohibiting the dissemination of some or all pictures, films or plays which are produced by making a child engage in sexual conduct. If this Court should hold that the state may in some circumstances prohibit dissemination of non-obscene materials produced by making children engage in sexual conduct, then this case would have to be remanded to the New York Court of Appeals. That court would then have to determine whether the statute could be construed, in accord with this Court's decision, to eliminate the remaining problems, if any, of overbreadth.

In sum, the decision below presents an important and substantial question calling for review by this Court. Significantly, respondent himself shows that there is a substantial question by his mistaken reliance on *Graham* v. *Hill*, 444 F.Supp. 584 (W.D. Tex. 1978), a decision striking down a Texas statute. *Brief in Opposition*: 8n. The Texas statute was much broader than that of New York and the basis for the court's decision rested on the Texas ban on materials depicting children merely observing sexual conduct. *Id.* at 592. Nonetheless, in the course of its opinion, the district court, relying on the *Ginsberg* case, stated that "[if] the statute were limited to prohibiting the depicting of minors actually engaged in sexual conduct, . . . the Court would likely have no hesitation in declaring its constitutionality." *Id.* Also overlooked by respondent, is that following the decision in *Graham*, the Texas Legislature, apparently relying on the quoted language, enacted a new statute similar to that of New York. *See* Tex. Penal Code Ann. Tit. 9, §43.25(e) (Vernon).*

Having unpersuasively argued that there is no question calling for review, respondent takes a different tack and argues that the decision below may be sustained because a state court may afford greater rights under the First

* Respondent, in the third footnote on page 11, also refers to the lower court opinion in *St. Martin's Press, Inc.* v. *Carey*, 440 F.Supp. 1196 (S.D.N.Y. 1977) which declared the New York statute unconstitutional, but was reversed on appeal because of the absence of a case or controversy, 605 F.2d 41 (2d Cir. 1979). The district court's conclusion was based on its opinion that the New York Legislature could not regulate the abuse of children outside New York, committed before the effective date of the statute (440 F.Supp. at 1205). Notably, as pointed out in the petition, the New York Court of Appeals never passed on this argument and respondent does not offer it as a reason to deny certiorari. Indeed, to the extent that this Court finds that the district court view in *St. Martin's Press* case has any merit, the New York Court of Appeals must be given an opportunity to decide whether to construe its statute accordingly.

Amendment than would this Court. *Brief in Opposition*: 12. This simply is not the law: "a state may not impose such greater restrictions as a matter of federal constitutional law when this Court specifically refrains from imposing them." *Oregon* v. *Haas,* 420 U.S. 714, 719 (1975). Of course, a state court may interpret a state constitution as affording rights beyond those guaranteed by the Federal Constitution. *Id.* at 719n. Here, however, the New York Court of Appeals never mentioned the New York State Constitution, but throughout its opinion referred exclusively to the First Amendment. Thus, there can be no doubt that the decision below rests exclusively on the First Amendment and is not based on a holding giving greater rights under the State Constitution.

Finally, also at page 12, respondent somewhat enigmatically argues that certiorari should be denied because, if the petition were granted, affirmance would be required and thus "render unconstitutional these 19 [similar] laws, which may yet be upheld *in their own state*" (emphasis in original).* To the extent it makes any sense, this argument is premised on the assumption that this Court will agree with the New York Court of Appeals. However, for the reasons submitted in the petition and this reply this premise is far from clear. New York, and these other 19 states with similar statutes, are entitled to a definitive ruling by this Court.

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* Of course, even though a denial of certiorari is not an opinion on the merits, if certiorari is denied here, other state courts may view the decision below as definitive.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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